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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 245

MILTON BERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The orders granting motions to dismiss (R. 68, 92) are not reported.

JURISDICTION

The orders dismissing the appeals were entered on May 29, 1963 (R. 68) and June 26, 1963 (R. 92). The petition for a writ of certiorari was filed on June 28, 1963, and was granted on October 21, 1963 (R. 93; 375 U.S. 878).

QUESTIONS PRESENTED

1. Whether, when the last day to file a notice of appeal in the United States District Court falls on Saturday, a notice filed on Monday is timely.

2. Whether the time to appeal the main conviction may be revived, after an untimely appeal is dismissed, by a reduction in sentence under Rule 35, F.R. Crim. P.

RULES INVOLVED

Rule 37(a)(2) of the Federal Rules of Criminal Procedure provides in pertinent part:

> *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. * * *

Rule 45(a) and (b) of the Federal Rules of Criminal Procedure provides:

> (a) *Computation.* In computing any period of time the day of the act or event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or

legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When a period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(b) *Enlargement.* When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.

Pertinent provisions of the Federal Rules of Criminal and Civil Procedure and of New York statutes relating to holidays are set forth in the Appendix, *infra*, pp. 21-24.

STATEMENT

1. ***First Appeal:***

On March 14, 1963, petitioner was convicted by a jury in the United States District Court for the Southern District of New York on two counts of an indictment which charged him with possession of counterfeit currency, in violation of 18 U.S.C. 472, and receiving stolen securities, in violation of 18 U.S.C.

2315.[1] On April 24, 1963, petitioner was sentenced to concurrent terms of two years' imprisonment and fined $1,000 on each count, or a total fine of $2,000. Judgment was entered the same day (R. 60-61).

On May 6, 1963, petitioner filed a notice of appeal dated April 30, 1963 (R. 62-63). The government immediately moved to dismiss the appeal as untimely, noting that petitioner's "time to appeal expired on Saturday, May 4, 1963, on which day the District Court was open to receive, *inter alia*, notices of appeal" (R. 64-65). An associate of petitioner's attorney filed an affidavit stating that the notice was executed on May 2, 1963; that on May 3, 1963, counsel requested that it be filed; that deponent, feeling ill, left the notice with his secretary asking that other lawyers attend to it; that "[y]our deponent did not pay particular attention to this matter"; that he was ill Saturday, May 4, and Sunday, May 5, and was not aware that there was a difference between the federal and the New York State Rules, the latter permitting papers due on Saturday to be filed on Monday (R. 66-67). On May 29, 1963, the court of appeals granted the motion to dismiss (R. 68).

2. ***Second Appeal:***

On May 31, 1963, petitioner moved in the district court to reduce his sentence under Rule 35, F.R. Crim. P., or to stay execution thereof, and for other relief (R. 69-71). His counsel filed an affidavit assuring the

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[1] He was acquitted on a third count charging transportation of stolen securities.

court that the matter was properly before it, inasmuch as petitioner's appeal had been dismissed because the notice was filed late (R. 79).

On June 10, 1963, the district court heard argument on the motion to reduce sentence (R. 81). Counsel reiterated that no appeal was pending and that the notice had been filed late because an associate in his office "became disturbed emotionally with the pressure of the daily routine and went home" (R. 83).

Counsel then suggested that "if the sentence were reduced a minimal amount, even to a day or two, that this would again begin the defendant's time to appeal running" (R. 83). The court asked counsel if he would appeal promptly if the court afforded him the time by reducing the sentence. Counsel told the court that he believed that the petitioner would decide to appeal promptly; "at least it would relieve the conscience of the attorney in my firm who unfortunately became ill * * *" (R. 84). Government counsel stated there was no merit to the claim that there would be a right to appeal if the sentence were reduced (R. 84). The court, stating that it had a contrary understanding, reduced the jail sentence by four months and the fine by $250 on each count (R. 84-85).

On June 10, 1963, an amended judgment was filed (R. 85-86). The following day, June 11, 1963, a second notice of appeal was filed (R. 87-88). Again the government moved to dismiss (R. 89), claiming "that the grant of a motion to reduce a sentence has no effect whatever on the original judgment of conviction and does not revive the right to have the judg-

ment of conviction reviewed once it has been, as here, irrevocably lost" (R. 91). On June 26, 1963, the court of appeals granted the motion to dismiss (R. 92).

SUMMARY OF ARGUMENT

This Court decided in *United States* v. *Robinson*, 361 U.S. 220, that the time to appeal, fixed by Rule 37(a)(2) of the Federal Rules of Criminal Procedure, is jurisdictional and that the time cannot be enlarged even where the failure to file may be due to the excusable neglect of counsel. Those principles control this case. The fact that the attorney erroneously thought that the State practice, which excludes Saturdays from the computation, prevails in federal courts cannot serve to extend the time for appeal.

Nor could the district court revive the right to appeal from the original conviction by a reduction of sentence. Rule 45(b) prohibits any extension of the period for taking an appeal.

The question of untimely appeals is a recurring one as to which differing solutions have been suggested. The only permissible approach, we submit, is to consider the desirability or undesirability of a change in the rules. Exceptions may not be read into a rule which was designed to be absolutely firm and explicit and has the force of a statute.

ARGUMENT

I

The Fact That the Last Day To File a Notice of Appeal Falls On a Saturday Does Not Extend the Time for Filing a Notice of Appeal.

In *United States* v. *Robinson*, 361 U.S. 220, this Court held that the failure of defendant's counsel to file a timely notice of appeal from a conviction of manslaughter deprived the court of appeals of jurisdiction, even though the lack of timeliness may have been due to the excusable neglect or mistake of counsel. The Court found that the language of Rule 45 (b), which specifically states that the court may not enlarge the period for taking an appeal, is "quite plain and clear" (361 U.S. at 224); that the history of the rule showed "a deliberate intention to eliminate any power of the courts to extend the time for the taking of an appeal" (361 U.S. at 228); and that the consistent judicial interpretations were to the same effect. The Court concluded (361 U.S. at 229):

> That powerful policy arguments may be made both for and against greater flexibility with respect to the time for the taking of an appeal is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision.

That case controls here. In this Court, petitioner does not even argue the illness of counsel as an excuse for the failure to file the notice of appeal on the tenth day. His argument is that the tenth day fell

on a Saturday; that, under the practice in the State courts of New York, Saturdays do not count; that Saturday is also a day on which federal courts close early; and that, therefore, his notice of appeal should be deemed timely. The argument is untenable.

Rule 45(a) of the Federal Rules of Criminal Procedure, which deals with the computation of time, provides in terms that "The last day of the period so computed is to be included, unless it is a Sunday or legal holiday * * *. A half holiday shall be considered as other days and not as a holiday."[2] There is of course no basis for suggesting that Saturday is a legal holiday as a matter of federal law. Petitioner acknowledges, moreover, that the Clerk's office was open on Saturday.

To be sure, the term "legal holiday" has been construed to include holidays which are made so by State laws, even though they are not national holidays. See *Prudential Oil & Minerals Company* v. *Hamlin*, 261 F. 2d 626 (C.A. 10). Saturday is not, however, a legal holiday in the State of New York, albeit the State courts are closed. New York General Construction Law, Sec. 24 (Appendix *infra*, p. 24), identifies New York's holidays and half-holidays. Saturday is not a holiday except for banking organizations. The term "half-holiday" has been defined to include "the period from noon to midnight of each Saturday which is not a holiday." Thus, under

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[2] Although merely a printing error, petitioner's quotation of this section (Br. 9) indicates the amendment which would be necessary in order to include Saturday within the Rule. See Proposed Amendments, Federal Rules of Criminal Procedure, 31 F.R.D. 690.

New York's controlling statute Saturday cannot be treated as a full legal holiday. At most it is a half-holiday, and the federal criminal rules explicitly provide that half-holidays "shall be considered as other days" for the purpose of computing time under the rules.

Petitioner is not asking that the federal rule as to holidays be construed by reference to the New York State statute on holidays; as pointed out above, that would avail him nothing. His suggestion, rather, is that local "practice" be incorporated into the federal system. It is not apparent how far this practice of incorporation would extend, but it is evident, we submit, that the approach is one which must be rejected in its entirety.

The very purpose of the Federal Rules of Criminal Procedure (and of the civil rules as well) is to set forth a uniform system of procedure throughout the federal courts.[3] There is no provision in those rules which even remotely suggests that State procedure has any bearing upon the taking of a federal appeal. See *Federal Deposit Ins. Corporation* v. *Congregation Poiley Tzedeck*, 159 F. 2d 163, 166 (C.A. 2). No federal case has ever held that Saturday is to be excluded in computing the time for appeal in a criminal case, because State courts or other State establishments may be closed. To the contrary, see *United States* v.

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[3] Petitioner's citation to cases involving the old jury practice (Br. 11) is inapposite because the federal statute then limited jurors to those qualified by States. See 62 Stat. 951. State qualification was abolished by the Civil Rights Act of 1957, 71 Stat. 638.

Isabella, 251 F. 2d 223, 225 (C.A. 2); *Crow* v. *United States*, 203 F. 2d 670, 672, fn. 12 (C.A. 9); 2 Moore's *Federal Practice* (2d ed.), ¶ 6.05; *Muse* v. *Freeman*, 197 F. Supp. 67, 69-70 (E.D. Va).

Petitioner's argument that his time should extend to Monday because he did not have ten full days within which to file the notice of appeal is based upon the fact that the clerk's office was open only one-half day on Saturday[4]—his last day for filing. The answer is that Rule 37(a)(2), F. R. Crim. P., provides that an appeal be taken by filing a notice with the clerk "within 10 days after entry of the judgment." The Rule does not say within 10 *full* days and the provision for half-holidays in Rule 45(a) shows that there is no room for such a construction.

Moreover, the provision that Sundays and holidays are to be counted unless the last day to file falls on such a day shows that there was no intention to provide an attorney ten normal working days in which to appeal. Consequently, it is clear from the face of the Rule that Saturday, whether treated as a half-holiday or an 8-hour day or a 3-hour day, was to be counted—not only for appeals but for all motions under the criminal rules.

It is also apparent that petitioner's counsel made no effort to file the notice of appeal on Saturday. He thus cannot rely on the fact that the clerk's office was open only half a day. Indeed, if any real effort to

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[4] The federal courts have been authorized to close Clerk's offices since 1945. See Report of the Judicial Conference of Senior Circuit Judges, September 1945, p. 19; *Id.*, October 1946 at 26.

file had been made on Saturday, even after the office had closed, the notice of appeal would probably have been timely. See *Casalduc* v. *Diaz*, 117 F. 2d 915 (C.A. 1), certiorari denied, 314 U.S. 639; *Ward* v. *Atlantic Coast Line R. R. Co.*, 265 F. 2d 75 (C.A. 5), reversed on other grounds, 362 U.S. 396; *Hetman* v. *Fruit Growers Express Company*, 200 F. Supp. 234 (N.J.); *Johansson* v. *Towson*, 177 F. Supp. 729 (M.D. Ga.); see 7 Moore's *Federal Practice* (2d ed.), ¶¶ 77.02, 77.04, pp. 4004-4005.

The new Federal Rules of Civil Procedure provide that when the last day to file papers falls on a Saturday, Sunday or legal holiday, the time is extended to the next business day. See Rules 6(a) and 77(c), F. R. Civil P. (Appendix, *infra*, pp. 22-24). A similar change is proposed for the new Federal Rules of Criminal Procedure, 31 F.R.D. 690. As a matter of policy, that may well be a desirable change. For present purposes, however, the only relevant consideration is that existing law provides otherwise. It can neither be ignored nor interpreted away.

II

The Federal Rules of Criminal Procedure Prohibit The Courts From Enlarging The Period of Time For Taking An Appeal

Petitioner sought to avoid the clear impact of the prohibition against enlarging the time to take an appeal by having an "amended" judgment entered. His counsel, on June 10, 1963, requested the district court to reduce his sentence "a minimal amount, even to a day or two" so that his time for appeal would run again (R. 83). The district judge specifically

inquired whether counsel would "promptly prosecute an appeal" if the sentence were reduced (R. 84). When the governmnt stated that it did not believe such a change would give the defendant a further right to appeal, the district court stated that its understanding was to the contrary. The court, however, was in error, as appears both from the language and history of the rules and the decisions of this Court.

Rule 45(b) is clear on its face. It provides that "the court may not enlarge * * * the period for taking an appeal." The only provision which tolls the time for taking an appeal is the filing of a timely motion for a new trial or in arrest of judgment. Rule 37 (a)(2) F.R. Crim. P. Petitioner's motion for reduction of sentence, filed 37 days after judgment of conviction, does not fall within the rule. Neither the filing nor the granting of such a motion can revive the time for taking an appeal which had already been lost.

The entire history of the appellate rules confirms this conclusion. The jurisdictional nature of a timely notice of appeal is an historic characteristic of federal appellate procedure. See *United States* v. *Robinson*, 361 U.S. 220, 224, 227, and cases cited.[5] Prior to the 1934 Criminal Rules, the time to note an appeal was three months. 43 Stat. 940. By 1928, Congress had simplified criminal appeals by eliminating writs of

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[5] See, since the *Robinson* decision, *Lewis* v. *United States*, 278 F. 2d 33 (C.A.D.C.); *Wilkinson* v. *United States*, 278 F. 2d 604 (C.A. 10), certiorari denied, 363 U.S. 829; *Manson* v. *United States*, 288 F. 2d 807 (C.A. 9); *Peterkin* v. *United States*, 311 F. 2d 219 (C.A. 10), *Durel* v. *United States*, 299 F. 2d 583 (C.A. 5).

error, the petition of appeal, and the allowance of an appeal (45 Stat. 54, 466), thus making appeals a matter of right although limited by time. In the 1934 Rules, the time was reduced to 5 days because of the past inordinate delays. See 52 Harvard Law Review, pp. 983-992. These reforms, in their essentials, were continued in the present Rules of Criminal Procedure promulgated in 1946, although the time for appeal was set at 10 days. Rule 37(a)(2). In addition, the new rules further simplified appeals by eliminating assignments of error. Rule 37(a)(1), F.R. Crim. P. Cf. Rule III, 292 U.S. 662-663. In effect, almost any paper evidencing a desire for review, timely filed in the clerk's office, will suffice as a notice of appeal. See *Coppedge* v. *United States*, 369 U.S. 438, 442, fn. 5. The only suggestion ever proposed which would have authorized judges to extend the time to appeal a criminal case was a limited one contained in the preliminary draft of the appeal rule, and it was entirely eliminated by the time of the Second Preliminary Draft.[6] In sum, the history of criminal appellate procedure shows a consistent purpose to make the taking of an appeal so simple that it can readily be accomplished in a short time without the intervention of the judge. This effort to eliminate judicial discretion was reinforced in Rule 45(b) by the explicit prohibition of discretionary extensions of time for appeal. Yet petitioner's argument, if accepted, would allow

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[6] Federal Rules of Criminal Procedure, Preliminary Draft, 1943, Appeal Rule No. 35(a)(2), p. 152. Cf. Second Preliminary Draft 1944, Appeal Rule 39(a)(2), p. 135.

what the rules expressly forbid, the exercise of discretion by a district judge as to whether an appeal should be allowed and an extension of time for the taking of such appeal.[7]

In a long line of decisions, the federal courts have refused to approve attempts to gain extensions of time in violation of the clear terms of the rules. This Court, with all its powers of discretionary review, has been careful to avoid even the appearance of granting untimely petitions where counsel has returned to the lower court to obtain a "new" judgment solely to perfect a timely appeal. See *Allegrucci* v. *United States*, 372 U.S. 954. As stated in *Wayne Gas Co.* v. *Owens Co.*, 300 U.S. 131, 137:

> Where it appears that a rehearing has been granted only for that purpose [taking a late appeal] the appeal must be dismissed.

And see *Credit Co.* v. *Arkansas Central Railway*, 128 U.S. 258 (*nunc pro tunc* order); *Department of Banking* v. *Pink*, 317 U.S. 264; *F.T.C.* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 211-212. Cf. *United States* v. *Healy*, No. 64, this Term, decided February 17, 1964.

A fortiori no such power exists in the courts of appeals. *Nix* v. *United States*, 131 F. 2d 857 (C.A. 5),

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[7] The discretionary power to allow an appeal *in forma pauperis* has been criticized by members of this Court as contributing to delay. See *Coppedge* v. *United States*, 369 U.S. 438, 450, 455-458; *Hardy* v. *United States*, 375 U.S. 277, 282, concurring opinion of Justice Goldberg. There is no reason to import such delay and confusion into the rules for noting an appeal.

certiorari denied, 318 U.S. 771. One cannot, by the device of an amended judgment which adds nothing for appellate review, avoid the consequence of the initial failure to comply with prescribed procedures. Many devices have been used to attempt indirectly to extend the time for appeal (see collection of cases 89 ALR 941 and 149 ALR 740) but the courts have been alert to prevent such belated attempts to confer jurisdiction. See *e.g.*, *Rayor* v. *United States*, 323 F. 2d 519 (C.A. 9), certiorari denied, 375 U.S. 993 (untimely motion for new trial); *Wilkins* v. *United States*, 228 F. 2d 37 (C.A. D.C.) (motion for a new trial on grounds of newly discovered evidence); *Kirksey* v. *United States*, 219 F. 2d 499, 501, fn. 4 (C.A. D.C.), certiorari denied, 358 U.S. 848 (motion to vacate sentence and to correct clerical errors); *McIntosh* v. *United States*, 204 F. 2d 545 (C.A. 5) (late allowance to proceed *in forma pauperis*); *Kimbaugh* v. *United States*, 199 F. 2d 453 (C.A. 5) (motion for reduction of sentence under 28 U.S.C. 2255); *Drown* v. *United States*, 198 F. 2d 999, 1007 (C.A. 9), certiorari denied, 344 U.S. 920 (denial of permission to file late motions for a new trial and in arrest of judgment); *Marion* v. *United States*, 171 F. 2d 185, 186 (C.A. 9), certiorari denied, 337 U.S. 944 (entertaining and denying a late motion for a new trial); *United States* v. *Froehlich*, 166 F. 2d 84, 85 (C.A. 2) (denial of motion to reargue motion to set aside verdict and dismiss indictment); *Nix* v. *United States*, 131 F. 2d 857 (C.A. 5), certiorari denied, 318 U.S. 771 (attempt to appeal from revocation of probation and reduced sentence); *Dembrofsky* v.

United States, 86 F. 2d 677 (C.A. 1) (application to vacate and delete part of a judgment); *United States* v. *East*, 80 F. 2d 134 (C.A. 8) (government's petition in the district court for rehearing in bankruptcy case); *Fewox* v. *United States*, 77 F. 2d 699 (C.A. 5) (motion for a new trial).

In civil cases, where the rules do provide a power to extend the time in cases of excusable neglect, the Court has held that, where an untimely post-trial motion (*e.g.*, a motion for a new trial) made within the appeal period was not challenged for untimeliness, so that the appellant was not informed of the need to proceed with his appeal, a notice of appeal filed within 60 days of the denial of the motion was sufficient to confer jurisdiction. *Thompson* v. *Immigration and Naturalization Service*, 375 U.S. 384; see, also, *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215. Those cases have no application here. The criminal rules do not permit an extension of time; petitioner's motion for reduction of sentence was not made within the time to appeal from the initial judgment; and the government did give him warning that it considered the motion inadequate to extend the time for appeal.

Nor can the motion for reduction of sentence be assimilated to the situation under 18 U.S.C. 4208(b) which was before this Court in *Corey* v. *United States*, 375 U.S. 169. There, the Court held that, when a defendant is sent for diagnostic study under the statute, the time for appeal may run either from the judgment initially entered, which under the statute

is deemed to be for the maximum, or from the final sentence ultimately imposed. The Court pointed out that under Section 4208 (b) "the proceedings in the trial court are not actually terminated until after the period of diagnostic study, review of the same by the district judge, and final sentence" (375 U.S. at 175). And in *United States v. Behrens*, 375 U.S. 162, the Court itself explained the distinction between the procedure under 18 U.S.C. 4208(b) and a reduction of sentence under Rule 35, stating (p. 165):

> But a reduction of sentence under Rule 35 is quite different from the final determination under § 4208(b) of what a sentence is to be. Rule 35 refers to the power of a court to reduce a sentence which has already become final in every respect. There is no such finality of sentence at a § 4208 (b) preliminary commitment. * * *

If petitioner were attacking something which occurred in the proceeding for reduction of sentence, he could appeal from the order reducing sentence. But that is not what petitioner is seeking to do. Petitioner is seeking to use the reduction of sentence to revive a right of appeal from the conviction which, in the words of the *Behrens* decision, had "already become final in every respect." That is precisely what is forbidden under the rules.

III

Any Change In The Rules Must Come By Amendment of the Rules

Petitioner claims he should have an appeal because of the seriousness of the issues he seeks to raise on

review. In effect, he is arguing that, if the issues are important, he is entitled to an appeal regardless of time.[8] But, as this Court stated in another context, "Appeal rights cannot depend on the facts of a particular case," *Carroll* v. *United States*, 354 U.S. 394, 405; see, also, *Decker* v. *United States*, 97 F. 2d 473 (C.A. 5); *United States* v. *Tousey*, 101 F. 2d 892 (C.A. 7). Wherever the line is drawn, whether it be at ten days or two years, the loss of a right because of a few days difference can be made to seem arbitrary. There are, as this Court stated in *United States* v. *Robinson*, 361 U.S. at 229, "powerful policy arguments" both for and against greater flexibility in fixing the line with respect to the time for the taking of an appeal. That policy argument was, as the *Robinson* case held, deliberately resolved in favor of a strict provision by the present Rules of Criminal Procedure. If changes are to come, they must come through the rules.

As noted in the *Robinson* decision (361 U.S. at 230, fn. 14), for truly fundamental error in criminal cases the law does provide various collateral remedies

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[8] We do not agree that there was any serious error at the trial. Petitioner, by a motion to suppress, attacked the seizure of evidence found in a storeroom at the rear of an automobile showroom where petitioner merely rented desk space. The court found that the seizure was lawful since made with the consent of the prime lessee of the premises (R. 56-57). The evidence showed that petitioner had no legal interest in or control over the storeroom (R. 44-45). Petitioner's statement, which the jury under the instructions would necessarily have disregarded (R. 50-53), involved only the count on counterfeit currency.

(notably, a motion under 28 U.S.C. 2255), which are unlimited by time. See, *e.g.*, *Sanders* v. *United States*, 373 U.S. 1.[9] But as to ordinary trial errors, a defendant is bound by the action of his counsel in noting or failing to note an appeal, just as he is bound by a myriad of decisions, some of them inadvertent or mistaken, which are taken in the course of a case. *Allegrucci* v. *United States*, 372 U.S. 954; *Sunal* v. *Large*, 322 U.S. 174.

Evaluation of the problem is a matter for the Rules Committee (see *Lott* v. *United States*, 367 U.S. 421, 425; *United States* v. *Robinson*, 361 U.S. 220, 229-230) because it is only by specific change in the rules that the procedures can be coordinated. If extensions are to be granted, who should have the power to confer or withhold the jurisdiction of the court of appeals—the district court or the court of appeals? If extensions can be given, for how long, for what reason and on what terms? What type of hearing will be required to determine why the notice was late? Some suggested proposals, instead of permitting extensions, would eliminate the possibility of delay by other means. One suggestion is to have the clerk automatically file a notice in each case and require the government to move to dismiss if no steps are taken to perfect the appeal. Another is to have the district court inform all defendants, not merely unrepresented ones, of the right to appeal and the limitations of time. The place to resolve these varying points of

[9] To the extent that petitioner advances a "due process" argument, this, of course, is a complete answer.

view is in the drafting of the new Rules of Criminal Procedure. The explicit policy formulated in the present rules does not permit judicial discretion on an *ad hoc* basis.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment should be affirmed.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys.

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APPENDIX

1. Federal Rules of Criminal Procedure

Rule 35 provides:

Correction or Reduction of Sentence.

The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

Rule 37(a)(1) provides:

(a) *Taking Appeal to a Court of Appeals.*

(1) *Notice of Appeal.* An appeal permitted by law from a district court to a court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate. Petitions for allowance of appeal, citations and assignments of error in cases governed by these rules are abolished. The notice of appeal shall set forth the title of the case, the name and address of the appellant and of appellant's attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, the place of confinement if the defendant is in custody and a statement that the appellant appeals from the judgment or order. The notice of appeal shall be signed by the appellant or appellant's attorney, or by the clerk if the notice is prepared by the clerk as provided in paragraph (2) of this subdivision. The duplicate notice of appeal and a statement of the docket entries shall be forwarded immediately by the clerk of the district court to the clerk of the

court of appeals. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to adverse parties, but his failure so to do does not affect the validity of the appeal.

Rule 43 provides in pertinent part:

Presence of the Defendant.

* * * The defendant's presence is not required at a reduction of sentence under Rule 35.

Rule 56 provides:

Courts and Clerks. The court of appeals and the district court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Sundays and legal holidays.

2. Federal Rules of Civil Procedure.

Rule 6(a) and (b) provides:

Time

(a) *Computation.* In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall

be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

(b) *Enlargement.* When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them. As amended Jan. 21, 1963, eff. July 1, 1963.

Rule 77(c) provides:

District Courts and Clerks

* * * *

(c) *Clerk's Office and Orders by Clerk.* The Clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a district court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Washing-

ton's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, and Christmas Day. * * * As amended Jan. 21, 1963, eff. July 1, 1963.

3. McKinney's Consolidated Laws of New York, Book 21, General Construction Law (1963 Pocket Part), § 24, provides:

Holidays; half-holidays

The term holiday includes the following days in each year: the first day of January known as New Year's day; the twelfth day of February, known as Lincoln's birthday; the twenty-second day of February, known as Washington's birthday; the thirtieth day of May, known as Memorial day; the fourth day of July, known as Independence day; the first Monday of September, known as Labor day; the twelfth day of October, known as Columbus day; the eleventh day of November, known as Veterans' day; the fourth Thursday in November, known as Thanksgiving day; and the twenty-fifth day of December, known as Christmas day, and if either of such days is Sunday, the next day thereafter; each general election day, and each day appointed by the president of the United States or by the governor of this state as a day of general thanksgiving, general fasting and prayer, or other general religious observances and Saturdays in accordance with the provisions of section twenty-four-a of this chapter. [§ 24-a. Closing of bank organizations on Saturday; emergency bank holidays]. The term half-holiday includes the period from noon to midnight of each Saturday which is not a holiday. As amended L.1955, c. 63, eff. March 10, 1955.

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